

**DORSEY'S
DEMURRER
IN LEO FRANK
CASE
IS HEARD BY
COURT**

Solicitor Attacks Motion
to

Set Aside Verdict
Because

Defendant Was
Absent From
Court Room

DECLARES NO DEFECT
APPEARS ON
RECORD

Says Right to Be
Present Was

Waived and Counsel
Told

Judge There Would Be No Complaint

The Court battle for the life of Leo M. Frank, convicted of the murder of Mary Phagan in the National Pencil Factory in April 1913, was resumed Friday by new lawyers with a motion to set aside the verdict of guilt against him. The hearing was commenced at 10 o'clock before Judge B. H. Hill, of Fulton Superior Court. Solicitor H. M. Dorsey, for the State, submitted his answer but with demurrers, and the demurrers took precedence. They were read immediately, and the Solicitor began arguing them.

Attorneys Tye, Peeples & Jordan, and others, appeared as Counsel for Frank in the new fight.

Shortly before 10 o'clock Friday the answer and the demurrer of the Solicitor general were submitted to Counsel for the defendant.

After perusing them, Attorney John L. Tye said to the Court:

"The question made by the demurrer will practically control the matter. Therefore, I suggest that your honor take it up now."

"I agree with you," said Judge Hill.

Attorney Henry Peeples, for the defense, then commenced the reading of the motion to set aside the verdict.

READS HIS DEMURRER.

On account of the procedure, it was not necessary to read Solicitor Dorsey's answer. Therefore, the Solicitor answered the petition by reading his demurrer.

First came a general demurrer. In that the State maintained that a motion to set aside a verdict should be predicated on some defect appearing on the face of the record. No defect appears on the face of the record. He demurred also on the ground that a motion for a new trial was made in this case and denied in the Courts, and any irregularities (if irregularity existed) should have been included in that motion and is supposed to have been incorporated in that motion by the law. The actions of Frank subsequent to the trial have amounted to an estoppel of any privilege he might have had to make at this point.

The Solicitor demurred further on the ground that the motion discloses that Counsel agreed with the Court on the waiver of Frank's presence, and that agreement is binding on Frank. He demurred on the ground that Frank after the trial had taken steps which are affirmatory of the action of his Counsel. He demurred on the ground that Frank was not denied any right, since the only right his presence in Court could have obtained for him was the polling of the jury; and the jury was polled.

The Solicitor submitted a special demurrer on two grounds, Nos. 6 and 7 of the defendant's motion. One of those alleged that Judge Roan, in view of his Statement of doubt, did not properly exercise his judicial authority when he denied the motion. He demurred to this on the ground that it was a part of the original motion already decided adversely to the defendant by the supreme Court. He demurred to paragraph 7 which deals with the disorder in and around the Court house and alleges it was impossible for Frank to have a fair trial under conditions existing, the de-

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MOTION TO SET ASIDE BITTERLY FOUGHT

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murrer being that that also has been adjudicated by the supreme Court.

Having read his demurrers, the Solicitor took up the argument for them.

The Solicitor read citations in support of his contention that a motion to set aside a judgment must be predicated on a defect which appears on the face of the record or pleading. He differentiated between a motion to arrest judgment and a motion to set aside judgment but took the position that to possess legal status either of these motions must be based on a defect in the record.

The Solicitor read decisions of the supreme Court that a motion to arrest judgment must be made during the time in which

judgment was rendered; and that a motion to set aside can be made at any time within the statute of limitations, which is three years after rendition of judgment. One of the decisions cited by MR. Dorsey was that in the case of Regopoulos vs. the State set out in 115 Ga. This case was decided by the State supreme Court on April 24, 1902, before the creation of the State Court of appeals. The Solicitor argued that this and other like decisions rendered by the supreme Court before the organization of the Court of appeals would control decisions and cases of like nature in the Court of appeals.

HILL'S DECISION CITED.

This point was made by Mr. Dorsey following a brief reference to the case of Lyons vs. the State, decided by the Court of Appeals November 9, 1909, the decision being written by Judge Ben H. Hill, then chief judge of the Court of appeals, now the judge presiding over the motion to set aside.

The decision in the Lyons case allowed a setting aside of the verdict on the ground that constitutional rights of the defendant had been contravened.

Solicitor Dorsey announced, he would show that the Lyons case was not analogous to the present issue in several important points.

In the case of Regopoulos vs. the State, the defendant after conviction, made a motion to arrest judgment on the grounds that he had been furnished with an incorrect list of witnesses who appeared before the grand jury, claiming his constitutional right in this regard had not been protected. His motion was overruled by the higher Court, and later the defendant moved to set aside the verdict. This also was overruled, in both instances the Court held there appeared to be no defect in the record on which the motions could be predicated.

The Solicitor continued citations to support his contention that a motion to set aside must be based on errors appearing on the face of the record. Before the motion for a new trial was made

to Judge Roan, and argued, and decided, and appealed without success, said he, the grounds of the motion to set aside might have been argued in habeas corpus proceedings, but the right to argue them was lost when the motion for a new trial was started without them. He quoted Daniels vs. Towers, in which the supreme Court decided that after it has passed on a felony case the right to raise technical points is lost. The Courts are fixed in their stand as to the timeliness or untimeliness of technical points, he said. He declared the motion cannot stand because the time for raising the technical issue set out in it has passed.

ANOTHER HILL DECISION.

Among the many cases cited by the Solicitor was another written by Judge Hill, in which the Court of appeals held the defendant had a right to the present throughout the trial, either in person or through his attorneys, but that the defendant could be absent without his absence working harm to his interests or rights; and that the point raised in that case on the defendant's absence should have been made at the proper time. The Court of appeals overruled the appeal.

The Solicitor contended that Frank's absence resulted in no injury to him; that all he could have done if he had been present would have been to poll the jury, which was done anyway in his absence. The Solicitor contended the absence of the defendant when the verdict was rendered is not a record question; that the law does not require a record to be made on this point.

The Solicitor cited the case of Nolan vs. the State. In that the defendant made a motion to arrest judgment, on the constitutional point of his rights. Judge Warner wrote the decision in that case, and incidentally in deciding it adversely to the plaintiff in error, held that a motion to set aside the verdict should have been made rather than a motion to arrest it. This ruling by Judge Warner resulted in the plaintiff in error filing a motion to set aside. The lower Court sustained the motion, and no appeal was taken to the supreme Court. The State sought to retry the defendant, who pleaded former jeopardy. This point was carried

to the supreme Court, and the contention of the defendant was upheld.

Solicitor Dorsey contended it was very clear that Judge Warner in his ruling held the motion to set aside should have been timely made.

At 12:30 o'clock, Court recessed for an hour.

READS MORE CITATIONS.

After the recess, concluding at 1:30 o'clock, the Solicitor continued reading citations to prove his contention that the act of an attorney is the act of his client, regardless of the presence or the absence of the client. He read citations to support his claim that the waiver of Frank's right to be present, by his attorneys, was fully binding on Frank.

He read a supreme Court decision in which the principle was set out that it is not sound law to allow attorneys for their own convenience to make a waiver, and then remain silent, taking their chances of acquittal, and then to attack that waiver.

He read another decision in which it was set out that it is the privilege of a defendant to be present at the rendition of a verdict, but that the exercise of that privilege rests with his will.

Other citations were offered to support the contention that the defendant has a right to waive that which the law establishes as his right, except when the waiver injures other parties or affects the public interests.

REVERTS TO LYONS CASE.

The Solicitor reverted to the Lyons case. He said in it the verdict was received during the enforced absence port the contention that the defendant had not waived his right to be present, although the attorney had waived his (the attorney's) right to be present. He said in that case the motion to set aside was made at the same term of Court, and immediately after the rendition of the judgment, while the whole case was in the Court.

The Solicitor declared there were two points in this decision (Which was written by Judge Hill as the decision of the Court of appeals) which differentiated it from the Frank motion to set aside.

The first was that the defendant's absence from the Court room was enforced because he was incarcerated in jail, he did not specifically or by inference waive his right to be present. The second point, one which the Solicitor has contended throughout his argument as stopping the Frank motion to set aside, was that the motion in the Lyons Case was timely made.

LAWYERS ARE EXCUSED.

Attorneys Rosser and Arnold, subpoenaed as witnesses, were excused by the Court until Saturday morning. Judge Hill intimated he expects to finish the whole case by Saturday night, perhaps with a high session Friday.

The State begins its answer with the admission that Frank was in the jail and not in the Court room when the verdict against him was rendered. It insists, however, that Frank waived his presence, and through his attorneys did waive it, and the attorneys agreed to the Court no advantage whatever would be taken of his absence.

Frank knew the verdict had been received and the jury discharged, on the afternoon of Monday, August 25, 1913, says the State, and before the Court pronounced sentence on him during the forenoon of Tuesday, August 26, 1913.

The State says Frank had the right to be present at the reception and rendition of the verdict, but this was a privilege accorded to the defendant, which privilege Frank had the right himself or through his Counsel to waive and renounce; and it was so waived and renounced by Frank and his leading and controlling Counsel, Messrs. Luther Z. Rosser and Reuben R. Arnold.

DEPRIVED OF NO RIGHT.

The absence of Frank was permitted by the Court and did not operate to the injury of others and did not affect the public interest, and did not deprive Frank of any right guaranteed to him by law.

The leading and controlling Counsel for Frank were Messrs. Rosser and Arnold, the State Messrs. Rosser and Arnold, the State asserts. At no time did Herbert Haas take any active part in the case, nor did Morris Brandon.

Said Rosser and said Arnold assured the Court that said Leo Frank requested the right to be absent at the reception of the verdict, and assured the Court that he had waived his presence, and assured the Court that Frank would not renounce their authority to make these waivers and would not, at any time or in any place, in any manner or form, take any exception to the failure of Frank to be present. They informed the Court that for reasons satisfactory to themselves they would not be present at the reception of the verdict, and they assured the Court no exception would be taken to their absence and that their presence was waived by Frank.

As a matter of fact, the State insists, there was never at any time any well grounded basis or reason for the suspicion that mob violence would be done the defendant or his Counsel had they been present. The facts were, says the State, that throughout the trial no demonstration of any kind was made against the person or life of Frank. There were no threats indicating that violence was contemplated, so far as the sheriff's force and the police officials were able to ascertain. It is true there was great interest manifested by the public, but the State insists the same was reasonable to expect. The State insists that the conduct of the case on the part of the attorneys for Frank was calculated to magnify innocent occurrences and was a studied effort to impress the Court with the existence of a feeling and prejudice against said Leo M. Frank which in fact did not obtain.

The State insists that Attorney Stiles Hopkins represented to the Court in the presence of Luther Rosser, Jr., that he had

authority to waive the presence of the defendant and that he did waive the presence of the defendant and demanded on behalf of Frank the poll of the jury in event the verdict would be one of guilt.

POWER OF ATTORNEYS.

Although the State contends Frank did waive his presence, it contends further that even if it were true that he did not waive his presence, Rosser & Arnold, his attorneys, by virtue of their relations, were empowered fully under the law to make the waiver. Rosser & Arnold made an express waiver to the Court and Stiles Hopkins made an express waiver to the Court.

The State's answer says with reference to the ignorance of Attorney Herbert J. Haas, of the conversation and agreement and waiver as made by Attorneys Rosser and Arnold, it may be true Rosser and Arnold did not advise their associates as to the details of their direction of the cause of the defendant. But it is not incumbent on the State to see that leading Counsel directing a cause communicate each strategic move to their associates who took no active participation in the presentation of the case and who absented himself from the Court without leave.

The State contends that the allegation that Attorney Haas at the time of the sentence of the defendant did not know what had been done, is not the truth.

If it be a fact, which the State denies, that Counsel absented themselves from the Court house on the pretended and claimed ground of apprehension this would not render their conduct less effective and binding, says the answer.

MOTIVE NOT IMPORTANT.

No matter what motive actuated the defendant and his Counsel, the solemn waiver was made and the obligation to the Court assumed not to take any advantage of the absence of the defendant. The safety of the prisoner would have been guarded had he been present at the reception of the verdict, regardless of

the jury's findings. No disorder or demonstration had taken place which should have led the Court or Counsel or defendant to suppose the crowd would resort to mob violence of any kind. The apprehension, if any existed, grew out of an over-weening desire on the part of those responsible for this impression on the Court to have such a situation really obtain, said parties knowing full well that all the substantial rights of the defendant would be safeguarded and protected, and knowing there was no sound reason on which to base any apprehension. It is more probable that counsel realized the conclusiveness of the evidence adduced against the defendant showing him guilty of the murder for which he was being tried, and the inevitable result; and as their further presence was wholly unnecessary, for their own convenience they preferred to be absent when the verdict was read.

BAD FAITH CHARGED.

The State says the defendant was given a fair trial in conformity with the law and established legal procedure, and that every constitutional and statutory right was accorded him; and that the defendant is seeking to escape just punishment which the due process of law is about to visit upon him for his crime; and that in bad faith he is now seeking to repudiate a contract and agreement made by his Counsel, which they were abundantly authorized to make for and on his behalf.

The State denies the defendant has been denied any right guaranteed him under the constitution of the United States and asserts he exercised a privilege when he chose to absent himself from the Court.

The State asserts that at no stage of the case was Frank unrepresented, but at each and every stage Frank had Counsel present representing him and looking after his interests.

The State asserted the reference to Judge Roan's comment when he denied the motion for a new trial had been passed on once by the supreme Court of Georgia, and that the supreme

Court has decided Judge Roan's expression does not in any way mean that the trial of Frank was not lawful.

SAYS TRIAL WAS FAIR.

The State continued that Frank did have a fair trial and Judge Roan so Stated to him on the morning he was sentenced. The Counsel for the defendant waited until after the argument on the last day of the trial, when they realized the conclusiveness of the evidence against Frank, to make a motion for a mistrial on propositions which the Court had fully investigated; and that Frank is now estopped from including these matters in his motion, which the State insists might most properly be termed a third motion for a new trial. The State insists that the cheering accorded to the Solicitor was not nearly so loud and boisterous as is alleged, and that the matter was fully dealt with on the original motion.

As to the allegation that the entire public press of Atlanta appealed to the Court to adjourn, the State has never seen such note and demands strict proof of it. If said note was written, it was (if written by disinterested parties with the best of motives) at best but a mere expression of opinion on the part of newspaper men who had not attended the trial and were not familiar with the situation except through hearsay; and if such letter was written, it should not operate at any time, much less at this late day, to upset and undo the work of the Court and jury which consumed as it did approximately a month.

POLLING NOT HINDERED.

It is not true that the polling of the jury was interfered with. When the cheering on the outside began, the windows were pulled down and the polling went on, the answer says.

The State asserts Frank was informed of the verdict an hour after it was rendered, and that then he made no objection as to his not being present and no complaint, as to the irregularity of the proceeding.

The State is informed, says that answer, that Frank's wife and his minister or rabbi and other friends were in the jail waiting with him for the news of the verdict.

The newspapers of Atlanta published on August 25 Statements that Frank's presence had been waived and that neither he nor his leading Counsel were present, but that Frank was represented by Stiles Hopkins and Luther Rosser, Jr., and that Hopkins had made the waiver in open Court.

The State further alleges Frank was a constant reader of these papers and received a copy of the editions containing the foregoing.

One the morning that Frank was sentenced, says the State's answer, he said to the Court, "I say now, as I have always said, that I am innocent. Further than that, my case is in the hands of my Counsel."

After reciting the various legal moves in the case, the State's answer sets forth that when Frank's case was argued before the supreme Court February 17, in the printed brief of his attorneys, this language appeared: "The defendant as not in the Courtroom when the verdict was rendered, his presence having been waived by Counsel."

Notwithstanding ample opportunity to object to his having been absent when the verdict was rendered, and notwithstanding the passing of three or four terms of the Superior Court, when arraigned before Judge Hill April 17, Frank was asked: "Is there any reason why sentence should not be pronounced?" and the Court asked his Counsel: "Have you anything further to say?" Neither Frank nor his Counsel made objection to the failure of Frank to be present when the verdict was rendered. But Frank did speak to the Court, concluding his talk with the following language: "Your honor, I am now ready that sentence be pronounced upon me."

The words and the course of conduct of Leo M. Frank have ratified and confirmed the conduct of his Counsel in waiving his

presence and treated said verdict in the proceedings aforesaid as entirely legal and proper, says the State's answer. The State insists that Frank by his silence until April 16, 1914, has been stopped from taking any exception to his absence.
